

IN THE SUPREME COURT OF MISSOURI

ERNEST BLAND,)	
)	
RESPONDENT,)	
)	
vs.)	Appeal No.: SC83939
)	
IMCO RECYCLING, INC., AND)	
METAL MARK, INC.,)	
)	
APPELLANTS.)	

Appeal from the Circuit Court of Scott County
State of Missouri

The Honorable David A. Dolan
Circuit Judge

SUBSTITUTE REPLY BRIEF OF APPELLANTS
IMCO RECYCLING, INC. AND METAL MARK, INC.

ON TRANSFER FROM THE SOUTHERN DISTRICT
OF THE MISSOURI COURT OF APPEALS

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Abbreviations:

R.A.	Reply Appendix
RSB	Respondent’s Substitute Brief
S.L.F.	Supplemental Legal File

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REPLY STATEMENT OF FACTS

Metal Mark and IMCO Recycling submit this reply statement of facts to correct misstatements in Plaintiff's Supplemental Statement of Facts.

Plaintiff charges Metal Mark and IMCO Recycling with an "inexcusable" omission of "the most material fact" in the case. (RSB, 11.) Plaintiff states Juan Torres, the person who supervised the assembly of the furnace involved in Plaintiff's accident and who ordered the removal of its doors at the Marnor plant, was, by his own testimony, an employee of IMCO Recycling. (*Id.*) Plaintiff's assertion is without support in the record.

Mr. Torres never testified he was an employee of IMCO Recycling. At trial, only excerpts from Mr. Torres's deposition were played to the jury. (T. 143-161.) These were offered in Plaintiff's case. (*Id.*) However, Plaintiff in his Supplemental Legal File has included the entire transcript from Mr. Torres's deposition. In an excerpt not read into evidence, Mr. Torres, in response to a question from Plaintiff's counsel, testified that he considered himself an employee of Marnor because he worked at the Marnor plant. (S.L.F. 72; Torres Dep. at 51, lines 8-10.)

The evidence at trial established that Mr. Torres was an employee of Metal Mark. At the time of Mr. Torres's employment, Marnor Aluminum Processing, Inc., ceased to exist by virtue of its merger with Metal Mark, effective June 3, 1996. (Ex. Y; R.A. 2, 7, 9.) Mr. Torres testified he worked for Marnor, for

Columbia, and for Residue Recycling Resources, which, as he explained, were part of Metal Mark. (T. 153-154.)

Mr. Torres became plant manager at the Marnor plant in July 1996. (T. 144). Previously, on June 3, 1996, Marnor Aluminum Processing, Inc., ceased existence through a merger with Metal Mark, with Metal Mark as the sole resulting corporation. (Exs. A, B, and C; Ex. Y; R.A. 2, 7, 9.)

In July 1996, Metal Mark was a wholly owned subsidiary corporation of IMCO of Illinois. (Ex. C.) However, there is no evidence IMCO Recycling had any involvement with the Marnor plant. (T. 384.) IMCO Recycling does not directly interfere with the day-to-day operations of its subsidiary corporations. (T. 384.) The plant managers themselves operate the plants on a daily basis. (T. 384.) It was not until March 31, 1998, that IMCO of Illinois merged with IMCO Recycling. (Ex. V.)

Mr. Torres's testimony at pages 151-152 of the trial transcript, which Plaintiff cites for the proposition Mr. Torres was employed by IMCO Recycling, does not support Plaintiff's assertion. (RSB, 11.) Mr. Torres' testimony at these pages follows:

Q. Okay. When you were plant manager [at] the Marnor Plant, who signed your paychecks?

A. I believe they came out of Texas. I don't recall the name.

Q. You don't know which company the check was drawn on?

A. It was IMCO, I believe.

Q. IMCO had its name on the checks?

A. I believe so. (T. 151.)

The “IMCO” mentioned in Mr. Torres’ testimony is not IMCO Recycling. There is no evidence in the record so stating.

Rather, the “IMCO” referenced in Mr. Torres’ testimony is IMCO Management Partnership, L.P. In October 1995, Metal Mark entered into an agreement with IMCO Management Partnership, L.P., to manage Metal Mark’s payroll. (T. 182; Ex. J.) IMCO Management Partnership is located in Texas. (Ex. J; T. 379-380.)

Plaintiff’s statement of facts also addresses the corporate relationship between Marnor and Metal Mark. (RSB, 10.) He cites Jonathan Markle’s deposition testimony, which is contained in Plaintiff’s Supplemental Legal File. (*Id.*) Mr. Markle testified he had no *personal* knowledge whether there had been a merger between Metal and Marnor. (S.L.F. 010.)

The excerpt from Mr. Markle’s deposition, which Plaintiff cites, was not admitted into evidence at trial, and should not be considered by the Court. (T. 268-280.) Moreover, the merger documents admitted into evidence demonstrate that Marnor did merge into Metal Mark effective June 3, 1996, with Metal Mark remaining as the surviving corporation. (Ex. Y.) The Plan of Merger so shows. (Ex. Y; R.A. 2, 7, 9.)

For his proposition the merger between Marnor and Metal Mark was for “accounting purposes only,” Plaintiff cites the resolutions passed by Metal Mark’s board of directors on May 31, 1996. (S.L.F. 47.) However, these resolutions only identify the date on which the merger was effective for accounting purposes. The resolutions provide as follows:

RESOLVED, that, effective as of June 1, 1996 for accounting purposes only, Subsidiaries merge (the “Merger”) with and into Parent, and Parent shall be the surviving corporation. . . . (S.L.F. 47.)

For all other purposes, the merger was effective on June 3, 1996, when the merger documents were filed with the Illinois Secretary of State. (Ex. Y; S.L.F. 46; R.A. 9.) The plan of merger filed with the Missouri Secretary of State so provides. (Ex. Y; R.A. 7.) This document states “effective as of June 3, 1996, Subsidiaries [*i.e.*, Marnor] merge (the “Merger”) with and into Parent [Metal Mark], and Parent shall be the surviving corporation.” (Ex. Y; R.A. 7.)

Finally, Plaintiff cites the deposition testimony of Jeffrey Mecom, which is contained in his Supplemental Legal File, as support for the proposition the Sikeston plant was still operating under the Marnor name at the time of his accident. (RSB, 10.) At trial, Mr. Mecom’s deposition was not read into evidence. Moreover, Mr. Mecom’s deposition testimony does not call into question the fact of the merger between Marnor and Metal Mark. Mr. Mecom’s testimony merely shows that Metal Mark continued to do business at the Sikeston

plant in the Marnor name. (S.L.F. 104.) However, effective June 3, 1996, the merger's effective date, Metal Mark had exclusive responsibility for payment of the Sikeston plant's operating expenses. (S.L.F. 104.)

ARGUMENT

Plaintiff's substitute respondent's brief does not follow the order of the points relied on in Metal Mark's and IMCO Recycling's substitute appellant's brief. For ease of reference, they conform the points in their substitute reply brief to follow the order of Plaintiff's brief.

- I. In the alternative and in the event the Court holds the trial court possessed personal jurisdiction over IMCO Recycling, Inc., which IMCO Recycling denies, the trial court erred in denying IMCO Recycling's motion for judgment notwithstanding the verdict because Plaintiff failed to make a submissible case against IMCO Recycling for the negligent supply of a dangerous instrumentality, in that Plaintiff did not prove that IMCO Recycling supplied the furnace to the Marnor facility or that IMCO Recycling knew or should have known the furnace contained no guards, shields, or doors.

Plaintiff's argument that he made a submissible case against IMCO Recycling under Section 392 of the RESTATEMENT (SECOND) OF TORTS rests on three assertions. First, IMCO Recycling, as the "ultimate parent" of the corporations concerned with the furnace, benefited from the profits generated by the furnace's transfer. Second, IMCO Recycling made the decision to transfer the furnace from the Pittsburgh plant to the Marnor plant. Third, Juan Torres, allegedly IMCO Recycling's employee, was responsible for the furnace's

installation. (RSB, 20.) Plaintiff's arguments should be denied. His assertions are not supported by law or the record.

A. IMCO Recycling's status as a parent corporation does not subject it to liability.

Plaintiff repeatedly refers to IMCO Recycling's status as the ultimate parent of the corporations involved with the furnace as a basis for subjecting IMCO Recycling to liability under Section 392. (RSB, 20, 30, 32.) However, IMCO Recycling's parent status and the benefits it derives from the operations of its subsidiary corporations are irrelevant. Simply because a parent company derives profit from a subsidiary does not make the parent company responsible for the subsidiary's acts. *Grease Monkey International, Inc. v. Godat*, 916 S.W.2d 257, 262 (Mo.App. E.D. 1995).

The exception exists where the wronged party pierces the corporate veil. *Id.* Here, Plaintiff has made no such contention.

B. IMCO Recycling did not supply the furnace.

Between pages 20 and 32 of his substitute brief, Plaintiff expends many pages of argument in an attempt to show IMCO Recycling was the "Dallas" with whom Jonathan Markle, Metal Mark's president, coordinated his decision to move the furnace to the Marnor plant in Sikeston, Missouri. The Honorable Phillip R. Garrison, in his dissenting opinion, rightly observed that Plaintiff never proved at trial who "Dallas" was, whether IMCO Recycling or IMCO of Illinois, Metal Mark's immediate parent. (Dissenting Opinion at 2-3.)

The inference that “Dallas” is IMCO of Illinois is supported by the record. Paul DuFour, IMCO Management Partnership’s executive vice president and chief financial officer, testified that a Metal Mark operations manager could have reported to IMCO Recycling or IMCO of Illinois. (T. 180, 185.) IMCO of Illinois has its offices in the same building IMCO Recycling does. (Ex. H at 41; Ex. AA.)

However, Plaintiff misconstrues IMCO Recycling’s position. IMCO Recycling’s argument does not require a determination that “Dallas” was an entity other than IMCO Recycling. Rather, the judgment against IMCO Recycling should be reversed as a matter of law because Plaintiff did not prove IMCO Recycling supplied the furnace to Metal Mark’s Marnor facility for purposes of a Section 392 cause of action.

When the trial record is distilled, Plaintiff’s lengthy argument in opposition is digested, and assuming for sake of argument “Dallas” is IMCO Recycling, the only evidence IMCO Recycling had any involvement with the furnace comes from Mr. Markle. Mr. Markle testified *he* made the decision to transfer the furnace “in coordination with Dallas.” (T. 276.) No other involvement by IMCO Recycling with the furnace’s transfer can be drawn from the evidence.

Mr. Markle’s testimony does not make IMCO Recycling a supplier for purposes of Section 392. His testimony does not show IMCO Recycling made the decision to transfer the furnace. As explained between pages 44 and 47 of IMCO Recycling’s opening brief, there is no substantial evidence IMCO Recycling made the decision to supply the Pittsburgh furnace to Metal Mark’s Marnor plant. The

record presents two contradictory inferences. From Mr. Markle's testimony, it is possible to infer that IMCO Recycling may or may not have directed the transfer. However, it is just as likely, if not more likely, that IMCO Recycling's only involvement was to receive from Mr. Markle his decision to move the furnace or to acquiesce in his decision that it be done. As Mr. Markle testified, he made the decision, albeit "in coordination with Dallas." (T. 276.)

Plaintiff, however, argues IMCO Recycling had the burden to prove who supplied the furnace. (RSB, 21.) Plaintiff ignores that he, as the proponent of a fact essential to his cause of action, had the burden of proof and that this burden remained with him throughout the trial. *Anchor Centre Partners, Ltd. v. Mercantile Bank, N.A.*, 803 S.W.2d 23, 30 (Mo. banc 1991).

Moreover, IMCO Recycling did establish who made the decision to transfer the furnace to the Marnor plant. IMCO Recycling took the deposition of Mr. Markle, who was no longer associated with IMCO Recycling. (T. 269.) Mr. Markle testified he, as Metal Mark's manager, made the decision to move the furnace "in coordination with Dallas." (T. 276.) Plaintiff then offered excerpts from Mr. Markle's deposition in his case at trial. (T. 269-280.)

Plaintiff's argument on IMCO Recycling's burden of proof also ignores Jeffrey Mecom, who testified in Defendants' case. Mr. Mecom testified IMCO Recycling did not interfere with the day-to-day operations of its subsidiary corporations. (T. 384.) Through Mr. Mecom, IMCO Recycling established that it did not supply the furnace to the Marnor plant. (T. 377-378.) Mr. Mecom

testified the furnace was Pittsburgh Aluminum, Inc.'s asset. (T. 377.) Mr. Mecom further testified "IMCO Recycling, Inc." never owned the furnace, never possessed it, and that it was supplied to the Marnor facility by Pittsburgh. (T. 377-378.) His testimony is consistent with the furnace's bill of lading showing Pittsburgh as the shipper. (Ex. G.) Pittsburgh was Metal Mark's wholly owned subsidiary. (Exs. B, C, and CC; T. 279.)

C. IMCO Recycling never had possession or control over the furnace to give possession of it to another.

Plaintiff's lengthy argument also ignores the legal requirements for an action under Section 392. Taking Mr. Markle's testimony that he made the decision to transfer the furnace "in coordination with Dallas" (T. 276), and giving Plaintiff every favorable intendment, including forced inferences unwarranted by the evidence, Plaintiff cannot make a submissible case. When the evidence is so viewed, IMCO Recycling merely had contact with the persons with actual control over the furnace, discussed the furnace's transfer, and concurred in the decision to move the furnace. These "facts" are insufficient to sustain a Section 392 claim against IMCO Recycling as a matter of law.

To subject IMCO Recycling to liability under Section 392, Plaintiff had to show that IMCO Recycling -- as the furnace's alleged "supplier" -- had possession or exercised sufficient control over the furnace such that IMCO Recycling "gave possession" of the furnace to the Marnor plant. Comment c to the RESTATEMENT (SECOND) OF TORTS § 388, which equally applies to Section 392, provides that a

person is a “supplier” who “for any purpose or in any manner gives possession of a chattel for another’s use, or who permits another to use or occupy it while it is in his own possession or control.” Comment c to Section 392 reiterates that liability as a “supplier” requires “possession or control” over the chattel. Lacking possession or control over the furnace, IMCO Recycling was never in a position to “supply” the furnace to any one for purposes of Section 392.

IMCO Recycling refers the Court to the cases discussed between pages 48 and 50 of its opening brief. These cases demonstrate an alleged supplier’s mere consultation with the person in actual possession and control of the chattel or giving one’s permission to give a chattel to another, absent evidence of possession and control, does not make the person a “supplier” under Section 392 (or Section 388).

Plaintiff concedes this is the law. In his brief, he makes no attempt to distinguish the holdings in these cases or explain why they are inapplicable. As these cases have been already addressed in detail, and have not been distinguished by Plaintiff, IMCO Recycling will not discuss them again in its reply.

D. Juan Torres was not IMCO Recycling’s employee.

Plaintiff also argues IMCO Recycling’s status as Juan Torres’s employer establishes that IMCO Recycling is the furnace’s supplier. (RSB, 32-37.) Plaintiff’s argument is not supported by the record. Mr. Torres was not IMCO Recycling’s employee. Contrary to Plaintiff’s repeated assertions, Mr. Torres never testified he was employed by IMCO Recycling. Rather, Mr. Torres testified

he worked for Marnor, for Columbia Aluminum, and for Residue Recycling Resources, which, as he explained, were part of Metal Mark. (T. 153-154.)

The fact Mr. Torres's paychecks came from "IMCO" in Texas does not make him an employee of IMCO Recycling. Metal Mark entered into an agreement with IMCO Management Partnership, L.P., under which IMCO Management Partnership managed Metal Mark's payroll services. (Ex. J; T. 182.) IMCO Management Partnership was located in Texas. (Ex. J; T. 379-380.) Therefore, his paychecks came from Texas.

These facts do not make Mr. Torres an employee of IMCO Recycling no matter how many times Plaintiff says that he was. Plaintiff's argument is nothing more than an attempt to make what is false true. However, the Court cannot ignore the dictates of common reason and accept as true or correct that which under all of the circumstances in the evidence cannot be true and correct. *Levin v. Sears, Roebuck & Co.*, 535 S.W.2d 525, 527 (Mo.App. 1976). Plaintiff's argument should be denied.

E. IMCO Recycling did not know the furnace had no guards, shields, or doors.

Plaintiff argues he presented substantial evidence IMCO Recycling knew or should have known the furnace had no guards, shields, or doors. (RSB, 37-40.) Plaintiff's argument ignores IMCO Recycling never owned the furnace and never possessed it. (T. 377-378.) There is also no evidence anyone employed by IMCO Recycling ever saw the furnace.

Nevertheless, Plaintiff contends IMCO Recycling had this knowledge because Juan Torres oversaw the furnace's assembly and installation at the Marnor plant. (RSB, 37-38.) Plaintiff's argument fails because it is false. Juan Torres was not IMCO Recycling's employee.

Plaintiff also cites an explosion in another aluminum recycling plant, the Sapulpa plant, as evidence the furnace was in a dangerous condition because it lacked doors. (RSB, 39.) Plaintiff's argument is irrelevant. IMCO Recycling's knowledge of an explosion at its Sapulpa plant does not establish it knew or should have known the Pittsburgh furnace transferred to the Marnor plant lacked guards, shields, or doors.

Again, there is no evidence anyone from IMCO Recycling ever saw the furnace, much less exercised possession or control over it. (T. 377-378.) And, Metal Mark's knowledge of the furnace's condition upon its installation at the Marnor plant cannot be imputed to IMCO Recycling. A parent corporation is not liable for its subsidiary's acts. *Grease Monkey International, Inc.*, 916 S.W.2d at 262.

Finally, Plaintiff's argument is belied by the record. Plaintiff states no one was injured by the Sapulpa explosion "because the furnace in question in that incident had doors." (RSB, 39.) Plaintiff cites to the testimony of Steve Sloan, who testified that no one was hurt in the Sapulpa accident. (T. 340.) But, Mr. Sloan never testified the reason why no one was hurt in the Sapulpa accident was because the Sapulpa furnace had doors.

As Plaintiff failed to produce substantial evidence that IMCO Recycling supplied the furnace, much less supplied a furnace known to be in a dangerous condition, which are essential elements of his Section 392 cause of action, the Court should reverse the trial court's judgment against IMCO Recycling as a matter of law.

II. The trial court erred in denying IMCO Recycling, Inc.’s motion to dismiss for lack of personal jurisdiction, because the trial court lacked personal jurisdiction over IMCO Recycling, in that:

- A. IMCO Recycling did not commit one of the predicate acts enumerated in Missouri’s long-arm statute necessary to subject IMCO Recycling to personal jurisdiction in Missouri; and
- B. IMCO Recycling did not have sufficient minimum contacts with Missouri to satisfy the due process requirements of the Fourteenth Amendment to the United States Constitution for the imposition of personal jurisdiction.

Plaintiff argues the trial court possessed personal jurisdiction over IMCO Recycling under Missouri’s long-arm statute because IMCO Recycling transacted business in the state, and because IMCO Recycling committed a tortious act within Missouri. Plaintiff also argues that, by filing a cross-claim against Max Sweet, IMCO Recycling waived its objection to personal jurisdiction. Plaintiff’s arguments should be denied.

1. IMCO Recycling did not waive its personal jurisdiction defense.

Absent service of process, a Missouri court lacks personal jurisdiction over a party defendant unless the defendant has consented to jurisdiction or waived the objection to personal jurisdiction. *Schuh Catering, Inc. v. Commercial Union Ins. Co.*, 932 S.W.2d 907, 908 (Mo.App. E.D. 1996). Plaintiff argues IMCO

Recycling waived its personal jurisdiction defense by filing a cross-claim against Max Sweet. (RSB, 43-44.)

In support, Plaintiff cites two cases handed down before 1980: *State ex rel. Sperandio v. Clymer*, 581 S.W.2d 377, 384 (Mo. banc 1979), and *Germanese v. Champlin*, 540 S.W.2d 109, 112 (Mo.App. E.D. 1976). (RSB, 43-44.) However, these cases have no precedential value because of the Court's decision in *State ex rel. White v. Marsh*, 646 S.W.2d 357 (Mo. banc 1983).

Both *Sperandino* and *Germanese* are based upon the historical distinction between a special appearance and a general appearance. When these cases were decided, a defendant was required to make a special appearance to challenge personal jurisdiction and service of process. This Court eliminated the special appearance requirement because it “serve[d] no useful purpose.” *State ex rel. White*, 646 S.W.2d at 361.

Plaintiff's waiver argument violates the rule in *State ex rel. White*. While there are no Missouri cases directly on point, the Court has noted that Rule 55.27, which governs the procedure for pleading defenses, is based on Rule 12(b) of the Federal Rules of Civil Procedure and, thus, “federal cases set forth a sound guide for Missouri practice.” *State ex rel. White*, 646 S.W.2d at 360-361.

The majority of federal courts hold a defendant does not waive its personal jurisdiction defense by filing a cross-claim, counterclaim, or third-party complaint in the same action in which the defendant asserts the defense of lack of personal jurisdiction. Wright & Miller, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d §

1397 at 10007 (1990). To hold otherwise would amount to a requirement that the defendant must make a special appearance, thus negating the rule abolishing the need for special appearances in federal court (and in Missouri under the rule in *State ex rel. White*). See, e.g., *Bayou Steel Corp. v. M/V AMSTELVOORN*, 809 F.2d 1147 (5th Cir. 1987) (filing third-party complaint not waiver); *Neifeld v. Steinberg*, 438 F.2d 423 (3rd Cir. 1971) (filing counterclaim not waiver); *Hasse v. American Photograph Corp.*, 299 F.2d 666 (10th Cir. 1962) (third-party defendant's cross-complaint against plaintiff did not waive his defense of lack of personal jurisdiction); *Olin Corp. v. Fisons PLC*, 47 F.Supp.2d 151 (D. Mass. 1999) (filing cross-claim not waiver); *Proctor & Gamble Cellulose Co. v. Viskoza-Loznica*, 33 F.Supp.2d 644, 662 (W.D. Tenn. 1998) (filing cross-claim and third-party complaint not waiver); and *Lomanco, Inc. v. Missouri Pacific R.R. Co.*, 566 F.Supp. 846 (E.D. Ark. 1983) (filing cross-claim not waiver).

Despite Plaintiff's argument, IMCO Recycling's cross-claim did not constitute a waiver of its personal jurisdiction defense. "If a defendant first challenges the court's jurisdiction, he may then enter and probe into the merits of the case without the necessity of making the time-honored 'special appearance' or reserving the jurisdictional point at each stage of the procedure. Having once hoisted the flag at the beginning of the journey, a litigant over whose person a court lacks jurisdiction need not continuously wave the flag at every way station along the route." *Walker v. Gruner*, 875 S.W.2d 587, 589 (Mo.App. E.D. 1994).

2. IMCO Recycling did not transact business in Missouri for personal jurisdiction purposes.

Plaintiff argues IMCO Recycling is subject to personal jurisdiction in Missouri because it transacted business in Missouri, which is one of the activities set forth in Missouri's long-arm statute, Section 506.500, R.S.Mo. 2000. Plaintiff asserts Juan Torres was employed by IMCO Recycling. (RSB, 45-46.) Plaintiff's argument is at war with Mr. Torres's testimony. Mr. Torres actually testified as follows:

Q. Okay. When you were plant manager [at] the Marnor Plant, who signed your paychecks?

A. I believe they came out of Texas. I don't recall the name.

Q. You don't know which company the check was drawn on?

A. It was IMCO, I believe.

Q. IMCO had its name on the checks?

A. I believe so. (T. 151.)

Nowhere in his testimony did Mr. Torres state he was employed by IMCO Recycling. Rather, as detailed in Defendants' reply statement of facts, Mr. Torres was Metal Mark's employee. (T. 153-154; Defendants' Substitute Reply Brief, 8-10.)

Mr. Torres testified that he worked for Marnor Aluminum Processing, Columbia Aluminum, and Residue Recycling Resources, which, as he testified, were all part of Metal Mark. (T. 153-154.) Plaintiff adduced no evidence that Mr.

Torres worked for IMCO Recycling. To the contrary, Mr. Torres's testimony concerning his job history shows his employment was limited to the Metal Mark organization. (T. 153-154.)

The fact Mr. Torres received a paycheck from Texas with "IMCO" on it does not make him IMCO Recycling's employee. Metal Mark entered into an agreement with IMCO Management Partnership, L.P., under which IMCO Management Partnership managed Metal Mark's payroll services. (Ex. J; T. 182.) IMCO Management Partnership was located in Texas. (Ex. J; T. 379-380.) It follows his paychecks came from Texas.

Plaintiff attempts to bolster his personal jurisdiction argument by claiming the profits from the Marnor plant "went directly back up the chain of command and wound-up [sic] in the pockets of IMCO." (RSB, 46.) Plaintiff's argument is contrary to corporate law and the rules that govern the existence of personal jurisdiction over parent corporations.

If any profits "wound-up in the pockets of IMCO," they were as dividends that IMCO Recycling derived from its ownership of stock in its subsidiary corporations. The mere fact a parent corporation has a subsidiary in Missouri from which it ultimately receives income is insufficient as a basis for personal jurisdiction over the parent. *State ex rel. Syntex Agri-Business, Inc. v. Adolph*, 700 S.W.2d 886, 889 (Mo.App. E.D. 1985). Plaintiff cites no authority to the contrary.

Plaintiff next claims in *State ex rel. Nixon v. Beer Nuts, Ltd.*, 29 S.W.3d 828 (Mo.App. E.D. 2000), “personal jurisdiction was properly based on the defendant’s internet presence in this state.” (RSB, 48.) Plaintiff’s argument mischaracterizes the case’s holding. In *Beer Nuts*, the Missouri Attorney General alleged that Beer Nuts had sold unregistered alcoholic beverages to minors in Missouri. While the Court in *Beer Nuts* noted the defendant had a web site that was accessible by Missouri residents, the Court based its decision on the defendant’s conduct in “admittedly deliver[ing] thousands of bottles of beer into the State pursuant to commercial relationships that Beer Nuts maintained with hundreds of Missouri residents.” *Id.* at 835.

Despite Plaintiff’s claim, the fact IMCO Recycling has a web site accessible to computer users in Missouri does not subject it to personal jurisdiction in Missouri. (RSB, 46-48.) Information from IMCO Recycling’s web site was not in evidence at trial, and should not be considered by the Court on appeal. If Plaintiff’s contention were the law, then every foreign corporation with a web site would be subject to personal jurisdiction in Missouri, regardless of the requirements of the long-arm statute, minimum contacts, or due process. However, this is not the law.

3. IMCO Recycling did not commit a tort in Missouri.

Plaintiff claims IMCO Recycling committed a tort in Missouri. (RSB, 49.) Plaintiff cites the testimony of Jonathan Markle, Metal Mark’s former president. Mr. Markle testified he made the decision, in coordination with someone in

Dallas, to move the furnace from the Pittsburgh plant to the Marnor plant. (T. 276.) Plaintiff contends Mr. Markle's testimony establishes IMCO Recycling is subject to personal jurisdiction in Missouri because it committed a tort in this state. Plaintiff's argument should be denied. It is unsupported by both the law and the facts.

Assuming IMCO Recycling's alleged participation in the decision to move the furnace from Kansas to Missouri is a tortious act -- which IMCO Recycling denies -- IMCO Recycling's participation is insufficient for personal jurisdiction. Plaintiff has not presented any evidence IMCO Recycling's participation took place in Missouri. Rather, the evidence demonstrates the contrary to be true. IMCO Recycling's involvement consisted of a single contact by Mr. Markle with someone in Dallas. (T. 276.) At trial, Plaintiff did not prove who "Dallas" was.

A single contact by a person in Missouri to another outside Missouri is insufficient to support the legal conclusion that the person outside of Missouri purposely availed himself or herself of the laws and protections of Missouri and, therefore, is subject to personal jurisdiction within Missouri. Rather, the alleged contact, as described by Mr. Markle, is at best a "random and attenuated contact" that does not subject IMCO Recycling to personal jurisdiction in Missouri. The use of the mail or telephone communications, absent something more, does not constitute the transaction of business for purposes of long-arm jurisdiction in Missouri or the satisfaction of the "minimum contacts" requirement. *Capitol*

Indemnity Corp. v. Citizens National Bank of Fort Scott, N.A., 8 S.W.3d 893, 904 (Mo.App. W.D. 2000).

The fact Plaintiff suffered harm in Missouri due to IMCO Recycling's participation or concurrence in the decision to transfer the furnace to Missouri is of no import. In *State ex rel. William Ranni Associates, Inc. v. Hartenbach*, 742 S.W.2d 134, 138 (Mo. banc 1987), this Court explained the fact that someone in Missouri could suffer harm as a result of a defendant's out-of-state activities does not make the defendant amenable to Missouri's courts, unless the defendant purposely avails itself of the benefits and protections of the laws of Missouri.

Finally, Plaintiff again alleges Juan Torres was an employee of IMCO Recycling. (RSB, 50.) However, Plaintiff's contention is simply wrong. As previously explained, there is no evidence Mr. Torres was employed by IMCO Recycling.

There is no evidence supporting the assertion of personal jurisdiction over IMCO Recycling under Missouri's long-arm statute. The claim against IMCO Recycling did not arise out of any business IMCO Recycling transacted in Missouri. Nor has IMCO Recycling committed a tort in Missouri. Moreover, there is no evidence IMCO Recycling purposely availed itself of the laws and protections of Missouri. Thus, personal jurisdiction under Missouri's long-arm statute has not been established. Therefore, the judgment against IMCO Recycling should be reversed and Plaintiff's action should be dismissed for want of personal jurisdiction.

III. The trial court erred in denying Metal Mark, Inc.'s motion to dismiss for lack of subject matter jurisdiction, because the trial court lacked subject matter jurisdiction over Metal Mark, in that exclusive jurisdiction over Plaintiff's claim against Metal Mark rested with the Missouri Division of Labor and Industrial Relations as Metal Mark was Plaintiff's employer at the time he was injured in the scope and course of his employment.

Plaintiff argues Metal Mark was not his employer at the time he was injured. (RSB, 53-59.) Plaintiff's argument is at war with his testimony and should be rejected.

Plaintiff testified Metal Mark was his employer in 1996 and 1997. (T. 304-305.)

Q. Who was your employer in 1996?

A. Metal Mark. (T. 304.)

Plaintiff further testified that Metal Mark was listed as his employer on his federal W-2 forms for both 1996 and 1997. (T. 304-305; Exs. D and E.)

Plaintiff offers no reason why this evidence, including his own testimony as to the identity of his employer -- Metal Mark -- should be ignored. A party is bound by his own testimony. *Brandt v. Pelican*, 856 S.W.2d 658, 664 (Mo. banc 1993).

Instead, Plaintiff argues Metal Mark is estopped from denying the corporate existence of Marnor Aluminum Processing. (RSB, 56.) Citing Rule 55.13, Plaintiff contends Metal Mark admitted Marnor's continued corporate existence.

Not so. Rule 55.13 governs a party's capacity to sue and be sued. The rule is not determinative of a party's employer. Moreover, contrary to Plaintiff's claim, the Defendants in their joint answer to Plaintiff's first amended petition specifically pleaded the merger between Marnor and Metal Mark, which was effective June 3, 1996. (L.F. 65.) Defendants' joint answer also pleaded that Metal Mark was Plaintiff's employer. (L.F. 65.) Plaintiff's argument should be denied.

Plaintiff also focuses on the original answer to his workers' compensation claim, which listed Marnor Aluminum Processing as his employer. (RSB, 60; S.L.F. 78.) This initial answer was incorrect, and was later supplanted. The subsequent answer stated Plaintiff was employed by Metal Mark. (Ex. DD.)

Plaintiff characterizes the corrected answer as part of a strategy to avoid liability for Plaintiff's common-law action against Metal Mark and even possibly to deprive Plaintiff the benefit of workers' compensation. (RSB, 61-62.) However, there is no basis for Plaintiff's charges, except speculation and his counsel's innuendo.

In the context of the merger between Metal Mark and Marnor Aluminum Processing and the fact that witnesses referred to the plant at which Plaintiff was injured as the Marnor facility, the misstatement in the original answer filed in response to Plaintiff's workers' compensation claim is innocent. (T. 10-13.) In no way can it be said to be a deliberate obfuscation of the true identity of Plaintiff's employer undertaken to obtain an improper advantage in this litigation. The

merger took place in 1996, almost a year before Plaintiff filed his workers' compensation claim. (Ex. DD.)

Plaintiff's argument is also disingenuous in light of his own trial testimony and his W-2s. (T. 304-305; Exs. D and E.) Plaintiff knew who his employer was and so testified. In no way can Plaintiff maintain that Metal Mark somehow manipulated his own trial testimony or his W-2s for the improper purpose of depriving him of a common-law cause of action against Metal Mark. This is especially true of Plaintiff's 1996 W-2, which identified him as Metal Mark, and which was issued over one year before his accident in 1997. (Ex. E.)

Also, contrary to Plaintiff's argument, the original answer filed in the Division of Workers' Compensation in the Marnor's name is not a "binding judicial admission" by Metal Mark. (RSB, 60-61.) Plaintiff's argument ignores that allegations of fact from abandoned pleadings are admissible as admissions against interest only against the party who originally filed the pleading. *Brandt v. Csaki*, 937 S.W.2d 268, 274 (Mo.App. W.D. 1996). As Marnor was the party in whose name the initial answer was filed, the initial answer can only be used as evidence against Marnor, and not Metal Mark. *Brandt*, 937 S.W.2d at 274.

Moreover, if Metal Mark were responsible for the statements made in the original answer filed on Marnor's behalf -- which Metal Mark is not -- those statements would still not constitute binding admissions against Metal Mark because they are in the nature of conclusions of law. Conclusions of law in abandoned pleadings are never admissible as admissions against interest. *Brandt*,

937 S.W.2d at 274; *DeArmon v. City of St. Louis*, 525 S.W.2d 795, 803 (Mo.App. E.D. 1975). Therefore, as the ultimate determination of the identity of Plaintiff's employer is a question of law, the statement in the original workers' compensation answer, which identified Marnor as Plaintiff's employer, is inadmissible as an admission against interest against Metal Mark. *See, e.g., Williams v. City of St. Louis*, 583 S.W.2d 556, 558 (Mo.App. E.D. 1979) (resolution of the existence of an employer/employee relationship for the purpose of an award of workers' compensation benefits is a question of law reviewable by the court of appeals).

Finally, Plaintiff's effort to dismiss the merger between Metal Mark and Marnor does not advance his position. (RSB, 65-67.) Plaintiff focuses on the phrase "for accounting purposes only" in Metal Mark's corporate resolutions for the plan of merger between Marnor and Metal Mark (S.L.F. 47) and argues this phrase is ambiguous and gives rise to a fact question that the trial court decided in his favor on the question of his employer's identity. Plaintiff's argument should be rejected.

Metal Mark's resolutions state:

RESOLVED, *that effective as of June 1, 1996 for accounting purposes only*, Subsidiaries merge (the "Merger") with and into Parent, and Parent shall be the surviving corporation (the "Surviving Corporation") pursuant to the Illinois Business Corporation Act of 1983; (S.L.F. 47.) (Emphasis added.)

The date of June 1, 1996, is simply the date the merger was effective for accounting purposes. At the time the resolutions were prepared, the preparers had no way of knowing the exact date the merger would be effective. However, an exact date was necessary for bookkeeping purposes. Therefore, the preparers stated the merger would be effective on June 1, 1996, for accounting purposes.

For all other purposes, the merger was effective on June 3, 1996, when the merger documents were filed with the Illinois Secretary of State. (Ex. Y; S.L.F. 46; R.A. 9.) This is consistent with the plan of merger attached to the articles of merger filed with the Missouri Secretary of State on March 10, 1997. (Ex. Y.) This document states “effective as of June 3, 1996, Subsidiaries merge (the “Merger”) with and into Parent, and Parent shall be the surviving corporation.” (Ex.Y; R.A. 7.)

There is no fact question. The plan speaks for itself. That Plaintiff offers a different opinion as to the plan’s legal effect on merger is insufficient to create a fact issue or support an argument the trial court made a factual finding to which this Court must now defer. *Cf., Roberts Fertilizer, Inc. v. Steinmeier*, 748 S.W.2d 883, 887 (Mo.App. W.D. 1988) (summary judgment is not to be precluded if the only facts alleged to be in dispute are actually the differing opinion of the parties over the legal effect of the documents that determine their respective rights).

Rather, the import of the plan of merger is a question of law for the Court to determine, one for which the Court owes no deference to the trial court. Under the plan, Metal Mark is the only corporation that survived the merger between

Metal Mark and Marnor. (S.L.F. 47; Ex. Y; R.A. 2, 7.) Afterward, Marnor had no legal existence separate and distinct from Metal Mark. The merger documents filed with the Missouri and Illinois secretaries of state can be read no other way. As Marnor was not in existence at the time of Plaintiff's injury, Marnor could not have been Plaintiff's employer.

The plain language of the plan of merger controls and, by virtue of the merger, Metal Mark was Plaintiff's employer as a matter of law because Metal Mark was the only corporation that survived the merger. This is in accord with Plaintiff's uncontroverted trial testimony and his W-2s for 1996 and 1997. (T. 304-305; Exs. D and E.) Under these undisputed facts, the trial court had no discretion to conclude that Marnor was Plaintiff's employer when Marnor no longer existed as a matter of law as a legal entity.

In the end, Plaintiff's argument that Marnor remained his employer in 1997 cannot be accepted as true in light of his testimony, his 1996 and 1997 W-2s, and the merger documents. Marnor no longer existed at the time. Plaintiff's argument, again, is an attempt to claim as true that which is false. However, the Court cannot ignore the dictates of common reason and accept as true or correct that which under all of the circumstances in the evidence cannot be true and correct. *Levin v. Sears, Roebuck & Co.*, 535 S.W.2d 525, 527 (Mo.App. 1976). Nor may the Court supply missing evidence or give Plaintiff the benefit of unreasonable, speculative, or forced inferences. *Skinner v. Thomas*, 982 S.W.2d 698, 699 (Mo.App. E.D. 1998). Therefore, the Court should set aside the jury's

verdict and the trial court's judgment in Plaintiff's favor and order his action against Metal Mark dismissed for lack of subject matter jurisdiction.

CONCLUSION

Defendant Metal Mark, Inc., requests the Court to reverse and vacate the trial court's judgment against it because the trial court lacked subject matter jurisdiction over Plaintiff's claim.

Defendant IMCO Recycling, Inc., requests the Court to reverse and vacate the trial court's judgment against it because the trial court lacked personal jurisdiction. In the alternative and in the event the Court concludes the trial court had jurisdiction, which IMCO Recycling denies, the trial court's judgment against it should be reversed as a matter of law because Plaintiff failed to make a submissible case for the negligent supply of a dangerous instrumentality.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

The undersigned certifies that on the 20th of December, 2001, a copy of appellants' substitute reply brief and a disk containing same were sent, pre-paid, by Federal Express, to: Mr. J. Michael Ponder, Attorney for Respondent, 715 North Clark, P.O. Box 1180, Cape Girardeau, Missouri 63702-1180.

T. Michael Ward #32816

Subscribed to and sworn before me this 20th day of December, 2001.

Notary Public

My Commission Expires:

CERTIFICATE OF COMPLIANCE

The undersigned certifies that appellant's substitute reply brief complies with the limitations in Special Rule No. 1 and Rule 84.06 of the Missouri Rules of Civil Procedure, contains 7,245 words, and that the computer disk filed with appellant's substitute reply brief under Rule 84.06 has been scanned for viruses and is virus-free.

T. Michael Ward

#32816

APPENDIX